

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT E. JOHNSON,

Plaintiff,

v.

HAROLD CLARKE *et al.*,

Defendants.

Case No. C05-5401FDB

REPORT AND RECOMMENDATION
REGARDING INJUNCTIVE RELIEF

**NOTED FOR:
DECEMBER 1st, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Plaintiff is not proceeding *in forma pauperis* and paid the full filing fee (Dkt. # 1).

Before the court is plaintiff's motion for a preliminary injunction. Plaintiff asks the court to order the Washington State Department of Corrections allow he and his wife to have extended family visits (Dkt. # 57).

The denial of extended family visits is the subject matter of this action. Plaintiff alleges the denial of his application for extended family visits at Mc Neil Island was racially motivated and is a violation of his equal protection rights. Plaintiff supports his motion with a memorandum and his own affidavit (Dkt. # 57, 58, and 59). Plaintiff was denied extended family visitation at Mc Neil Island under a provision of the policy that allowed for denial if a person had no positive prognosis for rehabilitation.

REPORT AND RECOMMENDATION 1

1 Defendants respond and argue the policy has changed and the reason plaintiff was denied
 2 extended family visits, positive prognosis for rehabilitation, is no longer a consideration (Dkt. # 61).
 3 They note that plaintiff has not reapplied for extended family visits despite his being aware of the
 4 policy change, and ask that he be made to reapply prior to court intervention (Dkt. # 61).
 5 Defendants cite to a relevant portion of the Prison Litigation Reform Act that limits prospective
 6 relief and states:

7 Prospective relief in any civil action with respect to prison conditions shall extend no
 8 further than necessary to correct the violation of the Federal right of a particular
 9 plaintiff or plaintiffs. **The court shall not grant or approve any prospective relief**
 10 **unless the court finds that such relief is narrowly drawn, extends no further**
 11 **than necessary to correct the violation of a Federal right, and is the least**
 12 **intrusive means necessary to correct the violation of the Federal right.** The court
 13 shall give substantial weight to any adverse impact on public safety or the operation
 14 of a criminal justice system caused by the relief.

15 (Dkt. # 61, page 2 citing 18 U.S.C. § 3626(a)(1)(A)).

16 Defendants argue the request for injunctive relief should be denied for a number of reasons.
 17 Those reasons are: plaintiff seeks to change the status quo; plaintiff should have to exhaust
 18 administrative options prior to seeking relief; plaintiff fails to show injury; and plaintiff is not likely to
 19 succeed on the merits (Dkt. # 61, pages 4 to 6).

20 DISCUSSION

21 The basic function of injunctive relief is to preserve the status quo ante litem pending a
 22 determination of the action on the merits. Los Angeles Memorial Coliseum Com'n v. National
 23 Football League, 634 F.2d 1197, 1200 (9th Cir. 1980). A party seeking injunctive relief must fulfill
 24 one of two standards, the "traditional" or the "alternative." Cassim v. Bowen, 824 F.2d 791, 795
 25 (9th Cir. 1987).

26 Under the traditional standard, a court may issue preliminary relief if it finds that (1) the
 27 moving party will suffer irreparable injury if the relief is denied; (2) the moving party will
 28 probably prevail on the merits; (3) the balance of potential harm favors the moving party; and
 (4) the public interest favors granting relief. . . . Under the alternative standard, the moving
 party may meet its burden by demonstrating either (1) a combination of probable success and
 the possibility of irreparable injury or (2) that serious questions are raised and the balance of
 hardships tips sharply in its favor.

Id. (citations omitted).

1 Under the Prison Litigation Reform Act no action may be brought unless available
2 administrative remedies have been exhausted. Here plaintiff exhausted his administrative remedies
3 prior to bringing this action, but now, an option that did not exist prior to filing this action is
4 available.

5 Our system of law derives from English law where historically there were several different
6 types of courts. One of the basic maxims in the court of equity is that a person seeking equitable
7 relief must come to the court with “clean hands.” This doctrine has been carried over to current day
8 and the 9th Circuit has held that equity requires those seeking its protection act fairly. Ellenburg v.
9 Brockway Inc, 763 F.2d 1091, 1097 (9th Cir 1985). Plaintiff has the ability in this case to reapply
10 for extended family visits prior to seeking equitable relief. This would be the least intrusive means of
11 possibly obtaining the relief he seeks.

12 The court recommends the motion for injunctive relief be **DENIED WITHOUT**
13 **PREJUDICE** and plaintiff be instructed to reapply for extended family visits. This holding would
14 further the purpose of the Prison Litigation Reform Act as it would force the parties to exhaust
15 available administrative remedies. Further, the holding leaves open the possibility of later court
16 involvement if that involvement is necessary. A proposed order accompanies this Report and
17 Recommendation.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure,
19 the parties shall have ten (10) days from service of this Report to file written objections. *See also*
20 Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
21 appeal. Thomas v Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b),
22 the clerk is directed to set the matter for consideration on **December 1st, 2006**, as noted in the
23 caption.

24 DATED this 16th day of November, 2006.

26 /s/ J. Kelley Arnold
27 J. Kelley Arnold
United States Magistrate Judge